

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],¹

Date Issued: November 12, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

**HEARING OFFICER DETERMINATION
BASED ON CROSS MOTIONS FOR SUMMARY DETERMINATION**

I. BACKGROUND

This Hearing Officer Determination (HOD) involves two complaints filed within nearly two weeks of each other. The first, Case _____ was filed with the Respondent and Student Hearing Office (SHO) on September 3, 2013. The second, Case _____ was filed with the Respondent and Student Hearing Office (SHO) on September 17, 2013. Both parties are represented by counsel.

A resolution meeting was held _____ on September 20, 2013, and resulted in no agreements. A prehearing conference was held _____ on September 24, 2013, and a prehearing order was issued on September 26, 2013. The issue in Case No.

_____ was preceded by a HOD in Case No. 2012-0795, issued February 21, 2013. The Petitioner filed a motion to consolidate the two complaints on September 20, 2013, and this was discussed

¹ All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

at the prehearing conference. The motion was granted in part, to ensure efficiency by having the issues in the two complaints heard at the same time, but the case files would not be combined, maintaining their separate timelines. (Based on the relationship between the two issues, this single HOD is issued with the facts and analysis for both included.)

A prehearing conference was held in Case _____ September 30, 2013, and a resolution meeting was held the same day, which resulted in a partial agreement. The prehearing order was also issued on September 30, 2013.

The evidentiary hearing was scheduled for November 5 and 6, 2013. On October 25, 2013, the Respondent filed a motion for summary determination on both complaints.² On October 31, 2013, the Petitioner filed an objection to the Respondent's motion and a cross-motion for summary determination. The Respondent did not reply to the Petitioner's cross motion.

On November 4, 2013, Petitioner filed a motion for continuance. That motion is now moot due to the determinations herein, based on the cross-motions for summary determination.

The HOD for Case No. _____ is due November 17, 2013, and the HOD for Case No. _____ is due December 1, 2013. This HOD, covering both complaints, is issued on November 12, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

² The motion was titled as a motion to dismiss, but in substance was for summary determination based on the facts.

III. ISSUES, RELIEF SOUGHT, and DETERMINATIONS

The issues to be determined by the IHO are:

Case No. Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide an individualized education program (IEP) reasonably calculated to enable him to be involved in and make progress in the general education curriculum, and meet each of his other educational needs that result from his disability, when the IEP lacks the assistive technology (AT) of an Accent 700 to permit the Student to effectively communicate?

Case No. Whether the Respondent failed to ensure the Student was placed by his IEP team and based on his IEP when the Respondent proposed to place the Student in a classroom for students with Autism at [Public School A], which was unilaterally determined by the Respondent?

In Case No. the Petitioner is seeking the provision of an Accent 700 for the Student's communication needs, and appropriate training for the Student, Parent, and staff on the use of the device. The Petitioner is also seeking compensatory education in the form of additional training for the Student on the AT device.

In Case No. the Petitioner is seeking placement at a separate non-public special education school.

In Case No. the Respondent denied the Student a FAPE when it failed to ensure that the AT device determined necessary by the IEP team was not recorded in the IEP, and did not provide that device to the Student.

In Case No. 2013.0527 the Respondent failed to ensure the Student was placed by his IEP team based on his IEP because the placement determination for the specific classroom in Public School A was made by a group that was not the IEP team and did not include the Petitioner.

IV. EVIDENCE

This matter is determined based on cross-motions for summary determination. Provided with the motions were 22 exhibits from the Respondent and 39 exhibits from the Petitioner.³ The Respondent's exhibits are listed in Appendix A. The Petitioner's exhibits are listed in Appendix B.

V. FINDINGS OF FACT

The following are the undisputed material facts pertaining to the issues in the two complaints:

1. The Student attended Public School B during the 2012-2013 SY.
2. The Student is enrolled at Attending School for the 2013-2014 SY.
3. The Respondent was ordered to fund an Independent Assistive Technology Assessment and revise the student's AT goals in a February 21, 2013 HOD.⁴
4. The student underwent a genetics evaluation on April 23, 2013.⁵ The Genetics Consultation Report diagnosed the student with a "severe neurodevelopmental disorder characterized by hypotonia, severe intellectual disability, poor to absent speech development, progressive spasticity and frequent and recurrent respiratory infections."⁶ The Student has a very significant developmental delay with essentially absent speech and very limited communication.⁷ The Student has brain abnormalities which are likely to result in "lifelong disabilities in the severe to profound range."⁸

³ At least eight exhibits were numbered twice (P 15, 16, 17 and 18).

⁴ R 1.

⁵ R 4.

⁶ R 4.

⁷ R 4.

⁸ R 4.

5. On May 22, 2013, the IEP team, including the Petitioner, agreed the Student was eligible for special education and related services under the definitions of both autism and other health impairment (OHI), and the team chose to utilize the OHI classification.⁹
6. On May 28, 2013, an IEP team meeting was held, including the Petitioner, and the Respondent did not have a representative present who was knowledgeable about the resources of the LEA, specifically placement options, and so the Respondent advised the Petitioner that “paperwork” would have to be sent to “the placement team” and then another IEP team meeting would be held to discuss the Student’s placement.¹⁰
7. On May 29, 2013, the AT assessment of the Student’s communication needs was completed.¹¹ The IEP team met to discuss the AT assessment and revise the IEP on June 10, 2013.¹² The assessment recommended a particular device for the Student, the Accent 700, over the Ipad, because the Ipad’s versatility permitted the Student to be distracted by non-communication apps.¹³ The team agreed with this recommendation.¹⁴ A representative of the Respondent at the meeting advised the rest of the team that he would have to check on the availability of the Accent 700 and would get back to the team within two weeks.¹⁵ He never did, and no information about the availability of the Accent 700 was provided to the IEP team until the resolution meeting held on September 30, 2013.¹⁶ At the resolution meeting, a different representative of the Respondent advised that the Accent 700 had been replaced by

⁹ R 7.

¹⁰ R 8. (This placement discussion and determination are not at issue in this case. This fact is material in that it demonstrates the Respondent’s policy or practice in handling placement determinations.)

¹¹ R 9.

¹² R 10.

¹³ R 9.

¹⁴ R 10.

¹⁵ R 10.

¹⁶ R 18, R 21.

a newer version, the Accent 1000.¹⁷ The team agreed that the Accent 1000 would be used and the representative of the Respondent advised the team she would set about obtaining it for the Student.¹⁸ Neither the Accent 700 nor the Accent 1000 have been specified in the Student's IEP.¹⁹

8. On June 20, 2013, the IEP team met again and increased the Student's level of specialized instruction to 27.5 hours per week.²⁰ A representative of the Respondent advised the team that another committee, the "LRE placement team", determined the Student's placement would be at the Attending School in a classroom for students with intellectual disabilities.²¹ A representative of the Attending School was contacted via telephone and advised the team that the Petitioner could visit the Attending School alone, but not with her advocate or attorney, unless she went through the Attending School's Principal.²² The Petitioner was then provided a written notice of the change of placement on June 20, 2013.²³
9. On September 3, 2013, the IEP team met again, and changed the Student's disability classification from OHI to autism.²⁴
10. The team discussed again changing the Student's placement from the Attending School and the classroom for students with intellectual disabilities to a classroom for students with Autism.²⁵ Another school was discussed and determined to not be appropriate because it was primarily for students with intellectual disabilities.²⁶ Public School A, with a classroom for students with autism, was discussed, but despite requests, the Respondent never provided any

¹⁷ R 21.

¹⁸ R 21.

¹⁹ R 13/P 24, R 19.

²⁰ R 11.

²¹ R 11.

²² R 11.

²³ R 12.

²⁴ R 17, R 18.

²⁵ R 16, R 18.

²⁶ R 18.

other schools with comparable programs.²⁷ The Petitioner was unsure of the Respondent’s programs and wanted to visit any school before agreeing to place the Student there.²⁸ She was told she could visit Public School A, but not with her attorney or educational advocate – for that she would have to talk to the school principal.²⁹ She was told the placement determination would be made by the LRE committee and that her desire to be part of the placement determination would be communicated to the committee, although they would make the decision.³⁰ The LRE committee, also referred to as the “Office of Specialized Instruction Location Team” and “Office of Special Education Location Team” had already conducted a “review” of the Student’s placement on August 28, 2013.³¹ The LRE committee placed the Student at Public School A on September 13, 2013.³² There is no evidence that alternate schools with similar programs were available from which the LRE committee could choose.

11. The Non-public School accepted the Student into its program on October 28, 2013.³³ The Non-public School can provide the Student with an individualized program where all of his academic and social needs will be met.³⁴

VI. CONCLUSIONS OF LAW

1. The parties agree that this matter should be determined based on the documentary evidence provided in their motions. They agree that the standard for summary judgment pursuant to Fed. R. Civ. Pro. 56 should apply with regard to their motions. Under that rule, summary

²⁷ R 18.

²⁸ R 18.

²⁹ P 34.

³⁰ R 18.

³¹ R 20.

³² R 20.

³³ P 35.

³⁴ P 35.

judgment must be granted when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). If a party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial” summary judgment may be granted against them. Celotex Corp., 477 U.S. at 322. To determine which facts are “material,” a tribunal must look to the substantive law on which each claim rests. Anderson, 477 U.S. at 248. A “genuine issue” is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. Id.; Celotex, 477 U.S. at 322.

2. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g.*, N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
3. A FAPE for a child with a disability under the IDEA is defined as:
 - special education and related services that –
 - (a) Are provided at public expense, under public supervision and direction, and without charge;
 - (b) Meet the standards of the SEA, including the requirements of this part;
 - (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

4. 34 C.F.R. § 300.105 provides:

(a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's —

(1) Special education under § 300.36;

(2) Related services under § 300.34; or

(3) Supplementary aids and services under §§ 300.38 and 300.114(a)(2)(ii).

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

4. An IEP may not be reasonably calculated to enable a student to be involved in and make progress in the general education curriculum if a particular service not currently being offered to a child appears likely to resolve or at least ameliorate the student's educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).
5. The material facts of this case are not in dispute, and the parties agreement that the case be determined based on the submitted documentary evidence is appropriate and efficient.
6. In this case AT was listed as a related service in the IEP, but failed to specify the particular device the IEP team determined the Student required. At the IEP team meeting where the AT evaluation was discussed, it was determined that the Respondent would have to check on the availability of the device, an Accent 700, but there was no question this was the device the team determined the Student required. The only other device in question, an Ipad, was ruled out, consistent with the AT evaluator's recommendations, because of its versatility which distracted the Student from using it for effective communication. Rather than get back to the IEP team within two weeks, however, the Respondent did not address the availability of the Accent 700 until September, and then informed the IEP team that the device had been

replaced by a newer model, the Accent 1000, which the Respondent advised the team it would obtain for the Student.

7. Educational placement is a concept within the Individuals with Disabilities Education Improvement Act (IDEA) that works hand-in-hand with the concept of least restrictive environment (LRE). See: 34 C.F.R. §§ 300.114-300.120, also 71 Fed. Reg. 46587, 45588 (August 14, 2006). There is a continuum of alternative placements each LEA must have, including “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions[.]” 34 C.F.R. § 300.115. Furthermore, while the placement decision is based on the IEP of the child, the IEP of the child is not based on the placement. 34 C.F.R. § 300.324. The Office of Special Education Programs (OSEP) analyzed the question of “whether a public school board has the unilateral discretion under the [IDEA] to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents.” Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001). The answer is no, but the matter is more complicated because of the vagaries of what is a “placement.” Whether moving a child from one building to another is a change of placement depends on whether the program in the new building “is substantially and materially similar to the former placement” and, if it is, such a change is not a change in placement. 71 Fed. Reg. 46588-89 (August 14, 2006). According to OSEP:

Historically, we have referred to “placement” as points along the continuum of placement options available for a child with a disability, and “location” as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child’s special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588. A placement decision is made, in the District of Columbia, by the IEP team. See D.C. Mun. Regs. 5-E3001.1. When a parent expresses doubt concerning the existence of a

particular school that can provide a FAPE, the IEP must include the name of the school identified to offer a FAPE to the student. A.K. ex. rel. J.K. v. Alexandria City School Bd., 484 F.3d. 672, 682 (7th Cir. 2007).

8. In this case, the IEP team, including the Petitioner, agreed to change the Student's placement from a classroom for intellectually disabled students at the Attending School to a classroom for students with autism. The Petitioner was advised about such a classroom at Public School A and was told the final decision would be made by another committee that would not include her. She expressed concern about the program, wanted to see it, and wanted additional options. There is no evidence that "two or more equally appropriate locations" were available and that a location determination had to be made. Furthermore, the appropriateness of the one school the Respondent advised the Petitioner of was questioned by the Petitioner. There can be no question that the change was one of educational placement as opposed to mere location because the move was from a program primarily designed for students with intellectual disabilities to a program for students primarily with autism. Thus, the IEP team's determination, without a question of which of two or more equally appropriate locations could provide service to the Student, should have led to a full discussion of the one school in question, in order for the Petitioner to be involved in making the determination about whether that school would be an appropriate placement. Instead, the Petitioner was directly advised that she would not be part of the final placement decision, in violation of IDEA and local D.C. law.
10. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The analysis to apply in a case such as this is to first

determine whether the agency “complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted). IDEA's grant of equitable authority empowers a court “to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.” Florence County School Dist. Four v. Carter By and Through Carter, 510 U.S. 7, 12 (1993) *citing* School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369 (1985). When considering the appropriateness of parental placement and reimbursement IDEA’s and State FAPE requirements do not apply, only that “Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required[.]” when considering the equities in fashioning relief for a denial of FAPE. Carter at 16 (1993). 34 C.F.R. § 300.148(c) provides:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

Use of the term “reimburse” at 34 C.F.R. § 300.148 does not establish that reimbursement is the only available remedy under that provision, nor does it establish that a direct tuition payment remedy is not authorized under § 1415(i)(2)(C)(iii) of the Act itself. *See, Mr. and Mrs. A. v. New York City Dept. of Ed.*, 769 F. Supp. 2d 403, 429 (S.D.N.Y. 2011). Thus,

even where a parent has not fronted the costs of the private school, the Respondent may be required to pay the private school directly.

11. The Petitioner has demonstrated that the Respondent failed to follow the procedures under IDEA by not involving the Petitioner in the placement determination and that the IEP proposed was not reasonably calculated to provide educational benefits because it lacked the AT device determined necessary by the IEP team. There are no equitable factors weighing against a remedy of reimbursement for the Petitioner's unilateral private placement of the Student. Furthermore, it is undisputed that the Non-Public School can meet all of the Student's social and academic needs. Thus, because the Petitioner has enrolled the Student in the Non-public School, the Student will be permitted to attend the Non-public School for the 2013-2014 school year at public expense.

VII. DECISION

Case No.

The Respondent denied the Student a FAPE when it failed to ensure the Student's IEP was reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of his other educational needs that result from his disability, when it did not get back to the IEP team within two weeks of the June 10, 2013, IEP team meeting to advise on the availability of the Accent 700, and specify the Accent 1000 as the AT device necessary to permit the Student to effectively communicate once that was determined in September 2013.

Case No.

The Respondent failed to ensure the Student was placed by his IEP team and based on his IEP because a committee, not the IEP team or including the Petitioner, determined the Student's educational placement at Public School A.

VIII. ORDER

Case No.

1. The Student will be provided an Accent 1000 communication device, no later than November 27, 2013, to use at his new school.
2. The Student, Petitioner, and all staff working directly with the Student at his new school will be trained on the use of the Accent 1000 no later than December 4, 2013.
3. If there is a delay in obtaining the Accent 1000 as a result of circumstances with the supplier/manufacturer, the deadlines herein will be delayed day for day, as documented and attested to by the Respondent's staff responsible for obtaining the device. Any delays that are due to the Respondent's failure to act are a failure to comply with this HOD.

Case No.

The Student is permitted to attend the Non-public School at public expense, including transportation, for the remainder of the 2013-2014 school year. The Respondent will pay the Non-public School directly, at rates not exceeding those established by the OSSE.

IT IS SO ORDERED.

Date: November 12, 2013

A handwritten signature in black ink, appearing to read 'Jim Mortenson', written over a light blue horizontal line.

Jim Mortenson,
Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).